United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1197-1228

To be argued by
THOMAS A. ANDREWS
JOHN J. GRIMES

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

NORMAN RUBINSON, EDGAR REYNOLDS, WILLIAM CHESTER, LAWRENCE LEVINE,

Defendants-Appellants.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT LAWRENCE LEVINE

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Defendant-Appellant Lawrence Levine
330 Madison Avenue
New York, New York 10017
(212) 661-3200

THOMAS A. ANDREWS, ESQ.
JOHN J. GRIMES, ESQ.
Of Counsel

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Docket No. 75-1197
75-1228

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

NORMAN RUBINSON, et al.,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT
LAWRENCE LEVINE

Preliminary Statement

The twenty count indictment charged ten defendants with conspiracy to violate, and with violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 (Sections 77e, 77q, 77x, 78j and 78ff of Title 15, United States Code) and Rule 10b-5 of the Rules and Regulations of the United States Security and Exchange Commission and Sections 1341 and

1343 of Title 18, United States Code. Appellant Levine was named in the first thirteen counts.

After a nine week trial before Honorable Constance Baker Motley, United States District Judge, and a jury, defendant Lawrence Levine and four others—William Chester, Edgar Reynolds, Norman Rubinson and Albert Feiffer—were convicted on various counts.* Three other defendants—Jerome Haskell, Walter Wax and Michael Gardner—were acquitted. Defendants Sidney Stein and Philip Kaye entered pleas of guilty, co-operated with the Government and testified at the trial as Government witnesses.

On May 29, 1975, judgment of conviction was entered against Appellant Levine; he was sentenced to serve eighteen months imprisonment—execution of sentence suspended—and to pay a fine of $10,000.

Mr. Levine now appeals from the judgment of conviction and sentence.

Issues Presented For Review

1. Did the trial Court err in failing to grant motions

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* Levine was convicted on count 1; Rubinson was convicted on counts 1 and 14; Chester and Reynolds were convicted on count 14; and Feiffer was convicted on counts 1, 2 and 14.

for mistrial and/or severance in the following instances:

a. When the Government made prejudicial references, during rebuttal summation, to documents not admitted into evidence;

b. When the Government stated, in effect, during rebuttal summation that defendant Levine had engaged in many other fraudulent schemes;

c. When the Government expended an inordinate amount of trial time on collateral matters specifically relating only to defendants Feiffer, Rubinson, Chester and Reynolds and their alleged prior similar acts;

d. When the Government vaguely suggested through the witness Weitzman, for no valid reason save prejudicial effect upon the jury, that defendants had engaged in certain dealings in Switzerland, which dealings were neither described nor connected to the crimes charged in the indictment?

2. Was defendant Levine denied a fair trial and due process of law when the trial Court placed certain restrictions on pro se defendants and defense counsel during the course of the trial with respect to the following:

a. Placing a blanket two-hour time limitation upon cross-examination regardless of the witnesses direct testimony;

b. Placing a half-hour limitation for cross-examination in certain instances;

c. Placing a blanket fifteen-minute time limitation for re-cross-examination regardless of the witnesses' testimony on re-direct examination;

d. Placing a two-hour limitation upon summation;

e. Preventing pro se defendants and defense counsel from going into certain subject matters during re-cross even though the particular subject matter was introduced during the direct case and notwithstanding the fact that the Government, on re-direct, went into this subject matter again and expanded same on re-direct examination?

3. Was Appellant Levine denied due process of law when the trial Court failed to instruct the jury with respect to the following:

a. On the question of criminal intent, declining to instruct the jury with respect to the existence of exceptions to the registration requirements of the Federal Securities Laws, and specifically, to the so-called "no-sale" exemption [15 U.S.C. §77d];

b. The law with respect to multiple conspiracies when a single conspiracy is alleged in the indictment and evidence adduced during the trial indicates in actuality multiple conspiracies;

c. The law with respect to the statute of limitations;

d. A supplemental instruction, requested and signed by pro se defendants, defense counsel and the Government, with respect to prejudicial remarks made by the prosecutor during the course of rebuttal summation?

4. Did the trial Court err in not granting defendants pretrial motions dismissing the indictment on the following grounds:

a. Unnecessary and prejudicial pre-indictment

delay;

b. Parallel civil proceeding giving Government tactical advantage?

5. Was Appellant Levine denied due process of law and a fair trial by the Court's failure to appoint counsel for defendants Rubinson and Chester? Was Levine further prejudiced by the haphazard manner in which defendants Rubinson and Chester conducted their defense at trial?

6. Did the Court err, and was Levine denied due process of law and a fair trial, in denying counsel for Levine the right to re-cross examine Mark White and to cross-examine Bosh Stack?

Statement of the Case

The Indictment

Lawrence Levine was charged in thirteen counts of the twenty count indictment with conspiracy (Count 1); violation of Sections 77e, 77q and 77x of Title 15, United States Code and Section 2 Title 18, United States Code (Counts 2-6); Sections 78j and 78ff of Title 15, United States Code; Section 2

Title 18 and Section 240.10b-5 Title 17, Code of Federal Regulations—Rule 10b-5 (Counts 7 and 8); and Mail Fraud (Counts 9-13).

The indictment charged a broad and very complex conspiracy to spin off, to sell and to manipulate the prices of the common stock of Stern-Haskell, Inc. beginning August 1, 1968. The conspiracy, as alleged in the indictment, involved many people, ten of whom were named as defendants and five more—Saul Weitzman, Louis Larry Hochen, Harry Silber, Arthur Kravetz and Rabbi Yehuda Weiss—who were named as co-conspirators.* The indictment also named B'Noth Jerusalem, a religious organization, as a co-conspirator.

In paragraph 7 of the indictment, the means paragraph, it is alleged that Rubinson, Stein, Chester and Haskell arranged for the issuance and distribution of the common stock of Stern-Haskell, Inc. without filing a registration statement. It is further alleged that Norman Rubinson and William Chester arranged for Stock Transfer Agency to act as the transfer agent of Stern-Haskell.** Levine is alleged to have arranged with Rubinson,

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* Additionally, the Government, in its Bill of Particulars furnished to defendants, named nine more co-conspirators—Frances Schick, Andrew McKay, Sten Nordin, Berry Fletcher, Stock Transfer Agency, Richard Stern, Marinus Laboratories, Ben Malmeth and Edwin French.

** There were no dates set forth in the indictment with respect

Stein, Feiffer, Wax, Haskell and Gardner for the establishment and maintenance of a public market and is further alleged to have taken cash payments from Rubinson, Stein and Feiffer in order to make arrangements for Wax and Kaye to make recommendations to the investing public which in turn resulted in the sale of over 75,000 shares of the common stock of Stern-Haskell, Inc.

The major charge against Levine, as set forth in greater detail below, centers around his receiving certain cash payments, in an undetermined amount, from Stein, Rubinson and Feiffer, to manipulate the price of Stern-Haskell.

The Evidence

The Court is respectfully referred to the brief of co-defendant-appellant Norman Rubinson, p. 8, for its Statement of the Evidence which is respectfully adopted in its entirety by Appellant Lawrence Levine.

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to these transactions. Furthermore, it is noteworthy to point out that the evidence adduced at trial showed that these transactions occurred in Florida months before Levine ever entered the picture--the so-called "Florida Phase" of the conspiracy.

POINT I

THE GOVERNMENT'S REMARKS ON SUMMATION CONCERNING OTHER ALLEGED FRAUDS OF DEFENDANT LEVINE, AND THE GOVERNMENT'S IMPROPER CONDUCT AT TRIAL CONCERNING THE CONTENT OF A CERTAIN EXHIBIT, DEPRIVED DEFENDANT LEVINE OF A FAIR TRIAL

During the trial Assistant United States Attorney Harris requested that all counsel and defendants pro se stipulate to the admission into evidence of certain back-up material for a chart (G.X. 23) which was purportedly a graphic illustration of the trading in Stern-Haskell stock. This stipulation was agreed to, and in advising the Court of it the Government stated (T. 4436):

> "All of the documents are with respect to transactions in Stern-Haskell stock, that would be the stipulation, Your Honor."

The controversy here arises because the Government maintains, if we correctly understand its position, that among the exhibits thus admitted was the so-called Lockwood Blotter--in its entirety--as Government Exhibit 500. This book, which is approximately 4 inches thick, 2 feet by 3 feet in height and breadth, contains an entry of each and every transaction ever made by Lockwood & Co. during the entire time it was in existence. Appellant Levine maintains however that he only consented, as the stipulation above set forth expressly states, to the admission of those entries which relate to Stern-Haskell

transactions. Common sense will allow no other conclusion because the Government has frankly admitted in the affidavit of Daniel J. Schatz, sworn to September 3, 1975*, that the Government considered the Lockwood Blotter to be a "chamber of horrors" which "revealed more obvious violations by defendant Levine concerning other stocks", and that it so advised counsel for defendant Levine at the time the above stipulation was entered into. After Government's Exhibit 500, whatever it was, was admitted into evidence by stipulation it was never again during the course of the trial referred to until the Government's rebuttal summation.

The witness Stein testified that he had received immunity from prosecution for any securities fraud which he had ever committed and which he revealed to the Government(T. 3447). He then gave the Government a list of some 250 stocks which comprised, by his own testimony, every stock that he had ever owned or had anything to do with in his entire career (843a). Thus he obtained, under the terms of his bargain with the Government, by simply jotting down the name, complete immunity for any conceivable securities law violation which he may have committed in any dealings he ever had, either directly

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* This affidavit has been transmitted to the Clerk of the Court of Appeals as part of the record on appeal. See Docket Entry dated 9-4-75 (Appendix p. 12a-1).

or indirectly, in any stock. Stein was clearly taking maximum advantage of this fresh start in life so to speak which the Government gave him, and obviously, with great care, sought to put behind him forever the threat of prosecution for any securities law violation he may have committed. That list was NOT admitted into evidence (1817a).

There appeared on that list approximately thirteen stocks that Lockwood & Co. had traded, at most in relatively small numbers in relation to the total issue of each security, during the period of its existence. We pointedly emphasize that Lockwood & Co. traded these stocks and that there is no evidence in the record that defendant Levine, one of the several traders at Lockwood during the period (1108a), had anything to do with them whatsoever. Unquestionably Lockwood did not play a role with respect to any of these stocks in any way even remotely similar to the role it played with respect to Stern-Haskell where it was in fact a major market maker and effected some 90% or more of the total trading in the stock.

Appellant Norman Rubinson's name was associated by certain testimony at trial with a few of the thirteen or so stocks which appeared in both the Stein list and the Lockwood Blotter (see Brief for Appellant Rubinson, Point IV).

Throughout the trial voluminous evidence of prior similar acts was offered against a number of the defendants.

Mr. Levine was never put on notice that evidence of prior similar acts would be offered against him at trial and indeed not one shred of such evidence ever was offered. That is to say, no witness ever testified and no document ever revealed that Mr. Levine ever acted with respect to any other stock in the manner he was alleged to have acted regarding Stern-Haskell: in substance traded some 90% and more of the issue and took money under the table for doing so. Mr. Levine's counsel therefore properly made the following observation in summation (1512a):

> Now, you know, you have learned from this trial, that prior similar acts can be proven for certain purposes by the prosecution. You know that if someone does something which the prosecutor says is wrong, the prosecutor under some circumstances is entitled to show similar prior conduct for certain purposes, which Judge Motley will instruct you about when she charges you on the law.
>
> But nevertheless they can show it, and they eagerly try to show it whenever they have it. You have never been shown, and you have not during this trial been shown, any prior similar conduct or relationship between Mr. Levine and Mr. Wax and anybody else in this case, principally Sidney Stein.
>
> Remember, Diston transactions were offered against some of these other men for the reason that Judge Motley will tell you. You never saw it here with them. The only relationship we know about in this case, and the only one that existed between Mr. Levine and Sidney Stein, involved one transaction, and that was the Blank Furniture deal. (Emphasis added)

Clearly counsel was pointing out to the jury that

there was no evidence in the record of any prior conduct by Mr. Levine "similar" to that which he allegedly manifested regarding Stern-Haskell, and no such "similar" relationship between he and Mr. Stein with respect to any other stock. The words "the only relationship we know about in this case" clearly and unmistakably refer to the subject topic which was "prior similar acts", and the word "similar" was used three times to express the thought embodied in these three paragraphs.

These three paragraphs are the only reference in summation for defendant Levine to lack of evidence of prior similar acts on his part. In a case where over a week of testimony and trial time was spent by the Government exploring before the jury prior similar, allegedly criminal, acts of co-defendants, which acts were unrelated to Mr. Levine, it was certainly proper for counsel to observed, with words that could not have taken more than a minute or two in summation, that no evidence of prior similar acts was offered against Mr. Levine.

The Government had a field day in court exploring the prior similar acts of other defendants and thereby unavoidably prejudiced defendant Levine to their advantage by overly complicating and lengthening the trial, confusing the jury and unavoidably engulfing Levine with the spill-over which flows from such testimony. At least subconsciously an association must have been made by the jury for there was ample evidence

throughout the trial that Mr. Levine was acquainted with other individuals on trial against whom such evidence of prior similar acts was offered. This should not be permitted for as the Court observed in United States v. Harris, 331 F2d 185, 187 (4th Cir. 1964):

> * * *it is inconsistent with our traditional conception of a fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

See also Kotteakos v. United States, 328 U.S.750 (1946), infra. Notwithstanding all of this, the Government would not permit the above-quoted brief and truthful observation to go unchallenged so as to perhaps in some measure let Mr. Levine escape the prejudice. Its response, set forth below, was devastating.

Mr. Levine applied for a severance when it became apparent that the prejudice of the seemingly endless prior similar act evidence against co-defendants had become so overwhelming that Mr. Levine could not escape it. This application was denied by the Court (674a, 675a). The pathetic effort was therefore made by counsel for Mr. Levine on summation, in a mere three paragraphs--a ripple of speech against a sea of testimony, to make the point that no evidence had been offered against Levine of prior similar acts or a prior similar relationship with Stein. The key word throughout the passage is SIMILAR; three times the word SIMILAR appears.

As aforesaid, the Government would not let the observation go unchallenged. It opened the flood gate. Mr. Wohl, during his rebuttal summation, announced to the jury (1590a):

> In addition, Mr. Andrews, after all of the evidence is in, says there isn't any evidence that Mr. Levine or Mr. Wax were involved in any other transactions with Mr. Stein; therefore, you should find, ladies and gentlemen, that this is a one-shot transaction and that all the rest of the time they were good little boys and they were never pulling off any frauds.
>
> You certainly didn't hear him ask that question when Stein was on the stand, did you? Did you get into any other deals with Mr. Levine? Did you hear him ask that one? Did you hear him ask Mr. Kaye whether there were any other deals with Mr. Levine or Mr. Wax? You sure didn't hear him ask that when the witnesses were on the stand. He didn't have the nerve to do that.
>
> Ladies and gentlemen, if you want to look at the evidence you look at this evidence, the Lockwood Blotter that is in evidence [holding the large book up before the jury]. Mr. Wax's trades are in evidence. You are going to hear about some other stocks. Do you remember the stocks that Sidney Stein testified were manipulated stocks? Allen Electronics, Beta Orthodontis, Boujeray Watches, which Kravetz testified to, Cadillac Knitting Mills, Calculator Computer, David Auld, General Auto Parts, Fallon Smith, the great Imperial Stock, Lanai. Loric, Viking General. They are all in the record, ladies and gentlemen, of the stocks being manipulated and brought out on cross-examination of the government witnesses. You didn't see him have the guts to ask that question when they were on the stand.
>
> Well, ladies and gentlemen, just look in Mr. Levine's blotter, if you are really interested in that. Look at what Mr. Wax was selling to his customers, if you are really interested in that. And you will find an answer to that particular problem.
>
> But the government didn't present that originally. Not because we didn't have it, not because we didn't

particularly want to focus on it, but because you should focus on the evidence that is related to Stern-Haskell, and the government submits that you should not be misled by suggestions as to what is not in the evidence or suggestions that there is something that's been left out because it isn't there. (Emphasis added).

Mr. Wohl's first premise was utterly false. He observed: "* * * Mr. Andrews * * * says there isn't any evidence that Mr. Levine or Mr. Wax were involved in any other transactions with Mr. Stein * * * ." That is not Mr. Andrews' observation at all, and it is not even a fair characterization of his observation.* Mr. Andrews said: "You have never been shown, and you have not during this trial been shown, any prior similar conduct or relationship between Mr. Levine and Mr. Wax and * * * Sidney Stein." (Emphasis added). Mr. Wohl, having thus completely missed the point, went on to tell the jury unmistakably that there were many other frauds in the past activities of Mr. Levine.

Mr. Wohl of course could not have said there is evidence in the record of this trial of prior fraudulent acts by Mr. Levine similar to his activities with respect to the stock of Stern-Haskell, because such evidence is not there to be found. He confirms this time and again later in the trial when he advised the Court, "What I am saying is, I do believe

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* In fact, during trial Mr. Andrews brought out on cross-examination of the witness Ochart that Stein had an orderly trading account at Lockwood & Co. (1125a), see also pp.18,19, infra.

I had a basis for the statement I made. What I am also saying, however, is that it was not established at the trial."(1876a) (Emphasis added). Again, the Court (1862a):

> "* * *it is now your position that the Government had no evidence of any prior transactions with Lockwood and Stein which could have properly been characterized as fraudulent as contained in the Government's Exhibit 500?
>
> MR. WOHL: I think that is correct Your Honor.

And further (1863a, 1864a):

> Mr. Wohl: No. What I am saying is that the book shows that Lockwood was trading several stocks that Mr. Stein indicated were stocks that he had been involved in manipulating the market on. The book shows that.
>
> What I am also saying, however, is that it is my position that just the book, without any thing more, would not show that Mr. Levine and Mr. Wax were engaged in a fraud.

And further (1864a):

> But I think that to the extent that I suggested to the jury that the blotter shows that Mr. Levine and Wax were engaged these additional frauds that that would not be supported in the case of that particular blotter.

And further, on the question of whether Levine had "dealt with Sidney Stein in other fraudulent transactions"(1872a):

> Mr. Wohl: I am saying there was evidence... but it wasn't really established at the trial... my argument was an argument that was made in good faith,...but I am also saying that this was not something that was really established at the trial.

And further (1874a):

> ...the Government agrees that in this trial we

have not established that they engaged in other crimes other than the Stern-Haskell thing.

The Court below in its wisdom at first determined that it was Levine's attorney who had in fact made misrepresentations to the jury (1847a). The Court even went so far as to suggest that this alleged misrepresentation was willful when it stated: "* * *contrary to what he knew to be the fact * * *," and again, "* * * Mr. Andrews was the one who misrepresented to the jury what the truth was * * *"(1848a). The record shows that it was the Government that had misstated the evidence to the jury and not Mr. Andrews. This is supported by Mr. Wohl's noble actions, for he both admitted his error and tried to correct it by joining in the request for a supplemental instruction to the jury regarding the error (1921a). Mr. Andrews never even suggested that Mr. Wohl was in bad faith. The Court below nevertheless saw fit to characterize Mr. Andrews' observation to the jury as a knowing misstatement. This attack upon the counsel's integrity was wholly unjustified; the Government's admissions and the facts show, as Mr. Andrews told the jury in summation, that there was no evidence in the record of any prior SIMILAR acts on the part of defendant Levine or of a prior SIMILAR relationship with Stein. This is all counsel said, and he did not attempt to hide from the jury any prior relationship which may have existed between Levine and Stein for it was Mr. Andrews who:

a) brought out on cross-examination that Stein had had an active trading account at Lockwood (1125a), and

b) that Stein had introduced Weitzman to Levine for the purpose of getting Levine to underwrite Weitzman's Blank Furniture offering (T. 1843-1853).

The Government, having acknowledged that there was no evidence of prior similar fraudulent acts in the record involving Mr. Levine, advised the Court that it was of the private opinion Levine had engaged in other fraudulent dealings in the past--"that it could have proved a course of fraudulent transactions between Levine and Stein" (2051a).(Emphasis added).

When the objection to the subject statement was first raised the Court observed that it did not remember the incident and "so to say the jury all remember it is just to overstate it" (1813a, 1814a). While the Court was speaking nevertheless a note was delivered from the jury in which the jurors specifically requested "* * * the list of stocks Stein presented and said he was involved with and * * * if in evidence,* the Lockwood trading records" (Court's Exhibit 10, 1817a).(Emphasis added). The jury had zeroed right in on the problem. Mr. Wohl had told them to look at the Stein list and the Lockwood Blotter

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* Amazingly, even the jury had doubts as to whether or not the Lockwood Blotter was in evidence!

for evidence of Levine's other frauds and that is exactly what they wanted to do. They believed him as well they should. But the jurors of course could not have known that his remarks on summation were improper, although unintentional, and that they never should have been given the suggestion that there were other frauds in which Mr. Levine was involved.

The Lockwood Blotter was at this point in the trial the subject of great controversy. The Government contended that the defense had stipulated to its admission in its entirety for all purposes, and Assistant United States Attorney Harris stated in substance that she had advised counsel that this was the Government's intention. Each and every defense lawyer, among them one former United States Attorney and two former Assistant United States Attorneys for the Southern District of New York and one former Assistant District Attorney for New York County, stated on the record that this was absolutely false (1829a),that Ms. Harris had advised them that the exhibit was admitted solely as back up material for the Stern-Haskell charts, and demanded an evidentiary hearing at which all of the attorneys, including the representatives of the Government, could be placed under oath and cross-examined. The Court denied the request, but Mr. Wohl at least acknowledged that there was a clear misunderstanding and agreed that the Lockwood Blotter should not be given to the jury. The Court advised the jury the Lockwood Blotter and Stein list had not

been admitted into evidence and therefore could not be considered by it (1852a).

This was clearly not a solution to the problem for it left in the minds of the jurors Mr. Wohl's assurance to them that evidence of other frauds perpetrated by Mr. Levine could be found in the Lockwood Blotter. The jury never saw the defense object to that assertion by Mr. Wohl because the Court directed that no objection be made by counsel during the Government's summation and made it clear that if such objection was made the attorney would be immediately cited for contempt (T. 6547-6551). This admonition was given by the Court out of the hearing of the jury, and so all the jurors knew was that when Mr. Wohl made the statement the defense lawyers just sat there without objecting to or challenging it in any way. When they asked to see the book they were simply told that it was not in evidence. In sum then they had no reason to doubt Mr. Wohl's assertion. The defense to their knowledge never objected to it, and therefore they must have concluded that the truth of it was conceded, although they had not during the trial heard one shred of evidence regarding any fraudulent act by Mr. Levine except for his alleged participation in Stern-Haskell. This is an outrage because had the Government, at any time in the trial, tried to prove prior similar fraudulent acts against Mr. Levine the defense would have most certainly disproven them. The Government never did this however, but tried by the clever use

Stein's list to implicate Levine in his other fraudulent activities.

Because of the two hour limitation on cross-examination, every second of which was used by counsel for Levine in cross-examining Stein, Stein was not cross-examined by said counsel with respect to his list of 250 stocks. There was no reason to use the valuable time in this area because the Government had never announced that it would attempt to prove other fraudulent acts against Mr. Levine and indeed never did try to prove such acts. If the defense could have ever anticipated that the Government in the closing minutes of its summation would tell the jury that Mr. Levine was involved in frauds which appear on Stein's list, that list would have been picked apart on cross-examination, stock-by-stock, so as to establish that even in the minimal trading by Lockwood & Co. in ten or so of the stocks that appear on the list over the entire period that Lockwood was in business, there was no criminal conduct on the part of Lockwood, much less Mr. Levine, with respect to any of them. Common sense should tell the Court that if there were prior similar criminal acts the Government would have surely tried to prove them at trial and given the defense an opportunity to negate them. It never did try to prove such acts, the defense pointed this out, and the Government simply got up when the defense would never have a chance to rebut and said to the jury in effect 'even though we did not try to prove

it, Levine committed plenty of other frauds.'

As aforesaid, simply telling the jury that the Lockwood Blotter and Stein list were not in evidence did not served in any way to negative the effect of the Government's overwhelminly prejudicial remarks. The Government and all defendants therefore agreed upon a supplemental instruction to the jury and submitted same to the Court in writing subscribed by the Government and all defendants either pro se or by their counsel (1921a). The Court declined to give the instruction. We most respectfully state that this was an abuse of the Court's discretion in the face of the fact that Mr. Wohl's statement was so obviously considered important by the jury and all parties had agreed to the instruction in the hope that it might have some curative effect. The mere fact that the Government indicated it had some evidence, which did not appear in the record, of another fraud in which Mr. Levine may have been engaged was no reason not to give the instruction.

All defendants were prejudiced by the subject remark made on rebuttal summation. It immeasurably strengthened the Government's theory of conspiracy and made Mr. Levine appear to be a person engaged in a course of criminal conduct. It made more credible the Government's assertions against other co-defendants and implied an on-going criminal association among them. This is so because at least some of the ten or so stocks which

appeared in both the Stein list and Lockwood Blotter were associated with Mr. Rubinson in prior similar act testimony of certain witnesses. For example, the following stocks were mentioned by Mr. Wohl: Bougerau Watches [Lockwood bought 500 shares and sold 2,400 shares], Calculator [bought 6,000 - sold 11,000], David Auld [bought 13,600 - sold 19,200], General Auto Parts [bought 3,800 - sold 1,600], Viking General [bought 3,500 - sold 5,400] (1869a). The volume of trading is included here to show how miniscule the amount was, although the jury was never told and therefore probably assumed the Lockwood trading in these stocks was comparable to Stern-Haskell in which over 200,000 shares were traded. The inference of association that flows from this is all too obvious. The defendants were crushed by a statement implying guilt by association wholly unsupported by anything save Stein's unilateral, self-serving OPINION that he considered all stocks he ever dealt in to have been fraudulent. The jury nevertheless, on the strength of this, was allowed to have the impression that there was a continuing course of conduct linking the defendants in some way together in many frauds.

The Court below in its opinion made the following observation: (2051a)

> The Government's position, as clarified, was that although there was no evidence of prior similar acts in the record (since the bulk of the Lockwood blotter was not in evidence), the Government could have proved a course of fraudulent transactions between Levine and Stein. This was what the Government had intended to convey to the jury in its rebuttal summation.

We respectfully submit that even if the Lockwood Blotter

was in evidence in its entirety it would not represent proof of prior similar frauds by Mr. Levine, and in support of this the Court's attention is respectfully drawn to the Government's admissions on this point hereinabove set forth (pp. 16-18, supra; 1862a-1976a). In sum then even if the Lockwood Blotter was in evidence in its entirety, which it was not, and even if Stein's list of 250 stocks which he says were crimes on his part was in evidence, which it was not, the two taken together would not show prior frauds by Mr. Levine similar to the fraud alleged in the indictment (p.17,supra). For the Government then to infer as it did in its final summation that Mr. Levine literally had a career of similar frauds behind him was a totally improper and prejudicial remark.

As the Court observed in Hall v. United States, 419 F.2d 582, 585 (5th Cir. 1969):

> "The highly inflammatory nature of the remarks is obvious. They charged a separate, and serious, criminal offense. * * * and where there are remarks such as here made the court should, as a minimum, sustain an objection and immediately and clearly instruct the jury that the argument is not supported by the evidence."

See also United States v. Pepe, 247 F.2d 838, 844 (2nd Cir. 1957). In the case at bar counsel objected to the prosecutor's statement at the first available opportunity (2048a) which, because of certain instructions given to counsel by the Court, did not present itself until after the jury had been charged and commenced its deliberations (2048a). In the hope of somehow salvaging the situation after the jury, by its request for Exhibits, showed that it was considering

the Government's remarks, all parties, including the Government, joined in a request that the Court instruct the jury to disregard the remarks and submitted a written draft thereof (1913a). The instruction was never given. "Where it is clear that there is no evidence in the record to support a charge of this nature, it seems to us that the district judge should sustain the objection and so inform the jury." United States v. Pepe, supra.

It is fundamental that the Government may not on summation make statements as prejudicial as those made here when no proof of them appears in the record, (Garris v. United States, 390 F.2d 862 (D.C., Cir. 1968); Robinson v. United States, 32 F.2d 505 (8th Cir. 1928); Latham v. United States, 226 F. 420, (5th Cir. 1915).

With all due respect, we cannot accept as warranted the trial Court's finding that "* * *overwhelming prejudice was unlikely and that proof of Levine's guilt was clear enough to dissipate any harm done * * *"(2057a). We respectfully disagree because Levine was acquitted of all counts save conspiracy, having been named in thirteen counts of the indictment, and further because co-defendant Wax, against whom similar proof had been offered at trial, was acquitted of all charges. This was a case in which the question of guilt or innocence hung in the balance until the closing moments of trial when the Government's unchallenged statement at the very end that Levine had committed many other frauds overwhelmingly tipped

the scales. We think that if this was not so the Government never would have made the remarks--they were sheer desperation.

There can be no doubt that the jury considered the statements because it specifically requested the exhibits which the prosecution told them contained the proof of Levine's alleged other frauds. For these reasons therefore it is respectfully requested that Appellant Levine's conviction be reversed.

POINT II

THE SINGLE CONSPIRACY THEORY ALLEGED IN THE INDICTMENT IS AT VARIANCE WITH THE EVIDENCE ADDUCED AT THE TRIAL, WHICH EVIDENCE DESCRIBED AT LEAST FOUR SEPARATE AND DISTINCT OPERATIONS, NONE OF WHICH WERE CONSPIRACIES

A. The Government Failed To Prove A Single Conspiracy With A Unitary Purpose

Count One of the indictment charges that all defendants were participants in a single conspiracy. The evidence at trial however showed that if there was in fact conspiracy, it was not a single conspiracy as alleged in the indictment but, rather, several separate and distinct conspiracies, each -- except for the involvement of Sidney Stein -- having different participants, in different geographical areas, at different times, and having distinct and different objects (see Figure 1, infra).

The Government attempted to equate this alleged conspiracy with the typical "chain" type conspiracy commonly found in narcotic cases, where several levels of operations are involved to bring the drugs from distributor to addict. Such is not the case here. Sidney Stein is the only common factor among these groups, and his omnipresence, his skillful manipulation of the actors, is what led and manipulated the Government into linking these disparate and unrelated persons and events together in one conspiracy. Defendants contend -- and the evidence supports

the contention -- that Stein orchestrated the spin-off sale and distribution of the common stock of Stern-Haskell, Inc.

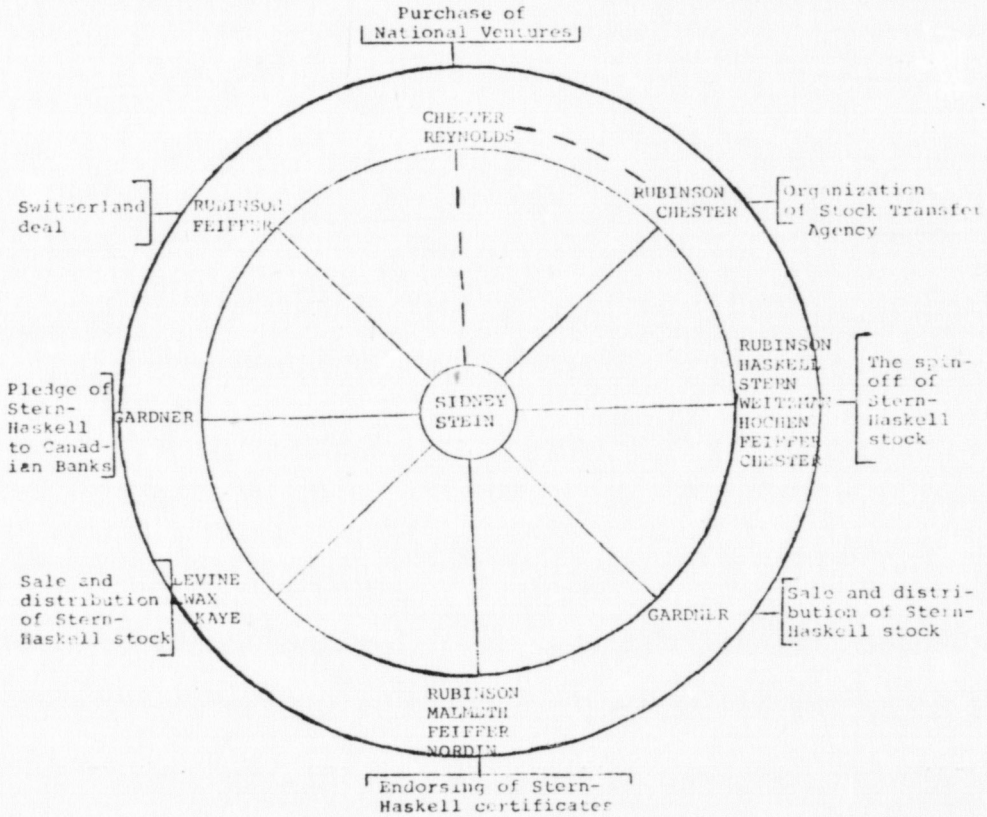

Fig. I*

The operational configuration of the various Stern-Haskell transactions as adduced from the evidence resembles a "wheel" or a "circle" with a central hub, Stein, and several spokes connecting the wheel to the hub. Each spoke would represent an independent group having no knowledge - or even reason to believe the existence - of any other group. (See Figure I) The only arguable connection would be the Florida

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* The vertical broken lines are in the graph to show that Sidney Stein may not have directed the purchase of National Ventures. The evidence with respect to this phase is not clear.

group as indicated by the broken line in the first quadrant of Figure I.

From the opening moments of the trial there was evidence to show that defendants were grouped together in only certain transactions and not related in any other way with other transactions. Assistant United States Attorney Wohl, in his opening statement, said that it would be helpful "to group the defendants into different geographical areas" (178a). He then went on to say that there were two stages (189a): an underwriting group consisting of Rubinson, Feiffer, Chester, Reynolds and Stein (182a); and a "distribution and marketing" phase (189a), consisting of Levine, Wax, Rubinson, Feiffer and Stein (191a). The first four to five weeks of the trial dealt primarily with evidence relating to the activities of the "underwriting group" in Florida and the many similar transactions they had conducted with complete openness in the past.* The remainder of the trial dealt primarily with the "distribution and marketing" of the common stock of Stern-Haskell, Inc. and the alleged Canadian bank transactions of Gardner. The case was submitted to the jury with the Court pointing out that the conspiracy included "at least five parts" (1664a).

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* Incidently, although the government alleged that proof of prior similar acts would be offered against Rubinson, no witness was ever able to show, by evidence or otherwise, that Rubinson was ever engaged in any similar criminal activity.

It is urged that this case involved several independent phases or operations, each with different actors, involved in separate groupings, acting independently and not adopting the enterprise of another group. The first phase involved the purchase of National Ventures, a public company, by Chester. The second phase included the purchase of Stern-Haskell stock by National Ventures and spin-off thereof to National Ventures stockholders and certain Stein nominees: Weitzman, Hochen and Feiffer. This operation went into effect and was completed before the third phase or object of Stein's plan began. The third phase was the attempt by Stein, now through his nominees in control of a large block of Stern-Haskell, to sell the stock to the public. This involved Gardner starting a market by placing Stern-Haskell into the "pink sheets".* This third phase went into effect and ended very quickly. The fourth phase was the alleged enlisting, an unplanned afterthought, of Wax and Levine to stimulate the market and the alleged pay-offs to them by Stein, through Kaye, to manipulate the price of the stock. The fifth phase involved Gardner's pledge of 50,000 shares of Stern-Haskell stock to a Canadian bank. The sixth and final phase, only a mere suggestion which came out of trial and was never developed, was Stein's alleged plan to somehow sell 350,000 shares of Stern-Haskell stock in Switzerland (457a). [This

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* Government Exhibit 126A, the listing application to the National Quotation Bureau, contains information that the stock was not registered and was a spin-off; THIS INFORMATION IS AUTOMATICALLY SENT TO THE SECURITIES AND EXCHANGE COMMISSION (T. 3207).

was mentioned at trial we believe only to prejudice the jury against the defendants by vaguely attributing to them Swiss connections.]

The Government will argue that these six phases are all part of one single and continuing conspiracy with one objective. This argument cannot stand. As mentioned above, every phase is a distinct and complete accomplishment; the common intent among the various participants to accomplish a universal objective is absent. Similarly absent are the indicia of criminal partnership such as commingling of assets, common headquarters or the mutual dependence among the several groups.

Appellant Levine suffered substantial prejudice in being charged with, and later convicted of, a single conspiracy when the evidence adduced during the trial shows that there were at least six separate operations, all unrelated except that each involved one common figure (Sidney Stein) and one security (Stern-Haskell). The mere fact that there were twenty-five co-conspirators named in the Indictment (13a) and Bill of Particulars (31a), of whom only ten were accused as defendants, clearly emphasizes the danger of transference of guilt and prejudicial evidence. This practice was condemned by the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946), which distinguished a prior decision, Berger v. United States, 295 U.S. 78 (1935) which had held that there was only "harmless error" when one conspiracy was charged and two were proved.

In Kotteakos, the Court said: (at page 766)

> * * * The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation. Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate.

The Court went on to say: (at page 774)

> * * * The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.

Recently this Court warned prosecutors to cease the practice of bringing indictments of a large number of defendants under the umbrella of a single conspiracy theory. United States v. Sperling, 506 F.2d 1323, 1340-1341 (2nd Cir. 1974), Cert. denied, ____, U.S._____ (1975):

> * * * [W]e take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb

> through a voluminous record to give adequate consideration to the claims of eleven separate appellants.

The Court then went on to point out, in a footnote, that the one "saving virtue" was the "competent manner in which Judge Pollack handled" the case.

The Second Circuit in United States v. Agueci, 310 F.2d 817 (2nd Cir., 1962), pointed out. (at page 827):

> * * * [T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights, Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance.

Similarly in an earlier decision, United States v. Russano, 257 F.2d 712 (2nd Cir., 1958), this Court said, citing Kotteakos: (at page 715)

> Whether or not a variance is prejudicial is a judgment that must be made on the facts of each case.

It is submitted that the totality of events cited above, together with advantages gleaned therefrom as cited below, point to a prejudicial variance between the indictment and the proof which, if taken together, justifies a new trial. Levine was forced into a trial involving twenty-five co-conspirators - eight of whom were defendants on trial - acting in six or more different, distinct plots. The sheer number of conspirators caused irreparable damages and prejudice to the defense of the action while at the same time providing the Government with tremendous advantage: (a) introducing evidence against one

conspirator which is admissible against all participants; (b) asserting jurisdiction over a number of persons who, had they been members of a separate conspiracy, would have had no connection with the Southern District of New York; (c) bringing the case within the statute of limitations; (d) introducing hearsay testimony, in the form of admissions, of other alleged co-conspirators; (e) presentations of lengthy prior similar act evidence against some defendants -- none of which involved Levine -- to the prejudice of those not involved; (f) placing time constraints on each defendant for cross-examination, re-cross and summation because of the large number of defendants and volume of proof necessarily required to prove six or more different operations; and (g) bolstering two or more weak cases by improper joinder of numerous alleged conspiracies into one hopefully strong unlawful scheme. These advantages to the Government have an overwhelmingly prejudicial effect upon the defense of each alleged co-conspirator on trial.

The Supreme Court in Kotteakos, addressed the problem of indicting a large number of persons: (at pp. 772, 773)

> "* * * Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each

> defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The mere fact that there are so many alleged conspirators and several distinct conspiracies with only one common factor, Sidney Stein, would warrant a new trial. The prejudice to individual defendants is self-evident, and the Court in Kotteakos recognized it: (at page 774)

> "* * * The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place * * * Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one."

The cases -- United States v. Miley, 513 F. 2d 1191 (2nd Cir. 1975) and United States v. Tramunti, 513 F. 2d 1087 (2nd Cir. 1975), U.S. App. Pndg. - cited by Judge Motley in the Opinion are inapposite (2058a). Both involve narcotic conspiracies which, by their very nature, are so completely different from the kind of conspiracy charged in the instant case as to defy comparison. The distinctions are self-evident (e.g., complexity

of fact issues, presence of contraband) and thus the cases are not in point.

B. The Court Erred In Refusing To Correctly Charge Jury With Respect to Multiple Conspiracies

Defendant Levine asked the Court to charge the jury in his request to charge - Request No. 9 - with respect to a single or multiple conspiracy (1887a):

> "If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged in the indictment; and in that case, you must return a verdict of not guilty as to all of the defendants under the conspiracy count."

The Government objected to this request and the Court declined to charge the jury that they must acquit if they find multiple conspiracies when only one was charged in the indictment (see 1664a-1671a). This Court in the case United States v. Calabro, 449 F.2d 885 (2nd Cir. 1971), cert. denied, 405 U.S. 928 (1972), has instructed: (at page 894)

> "* * * it is better practice to instruct the jury that they must acquit if they find multiple conspiracies when only one conspiracy is charged * * *"

In its objection to defendant Levine's Request No.9, the Government argued that its Request No. 17 correctly stated the law in this circuit, citing United States v. Borelli, 336 F.2d 376 (2nd Cir. 1967), cert. denied, 379 U.S. 960 (1965). The Government based its claim on the "all or nothing at all" tenor of defendant Levine's request.

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* The Court deemed all such requests to be made by all defendants.

It is submitted that defendant Levine's Request No. 9 is precisely the charge contemplated by Borelli, and the law in this circuit. The jury must be instructed that proof of more than one conspiracy must result in an acquittal. This was exactly what the Supreme Court faced in Kotteakos (at pages 768 - 769):

> "* * *The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.
>
> This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference* * * ." (Emphasis added)

In a recent lower court decision, United States v. McDaniels, 57 F.R.D. 171 (E.D. La., 1972) the court stated (at page 176):

> "* * * If a single conspiracy had been charged, it would have been necessary for the prosecution to prove that only one conspiracy existed, and proof of two separate conspiracies involving different parties would have required acquittal. (Emphasis added)

The practice in the Southern District of New York is not unlike the practice stated above. In United States v. Stoller, 74 Cr. 159, (D.C. S.D.N.Y. 1973), Judge Tyler charged the jury as follows (T.3545):

> "Now, it is perfectly proper to show, as the Government has here alleged, a scheme with one or more purposes. On the other hand, if you were to determine that the Government's evidence proved not one conspiracy as alleged, but two or more separate conspiracies involving different people, why, then you would be obliged to acquit these defendants. The reason for that is, as I have already stated in very simple terms, this indictment, Count 1, charges one integrated scheme, and these two defendants on trial are named as co-conspirators in that scheme.
>
> Therefore, it would be manifestly wrong, and the law recognizes this, if you were to determine that all that has been proved here is really two or three separate conspiracies of a somewhat different nature, then you would be obliged to acquit the defendants even though you might say that, well, one or both of them might have been involved in somewhat a different conspiracy than here alleged.

The clear statement of the law, as set forth above, requires that the trial court specifically instruct the jury that in the event it finds more than one separate conspiracy to have existed where only one is charged in the indictment it must acquit the defendants. The jury must not be left on its own to construe this by what is even necessary implication from a vague and nonspecific instruction such as the one delivered herein (1671a), Kotteakos v. United States, supra, at page 768. Here the court below stated one side of the rule: "Although it

is necessary that you find that a single overall conspiracy existed * * * [Y]ou must find a defendant who is not a member of a single conspiracy not guilty of the conspiracy charge." (Emphasis added). It however omitted to charge the balance of the rule which is, as we understand it, that if it found multiple independent conspiracies rather than one single conspiracy as charged, then it must acquit all defendants of the conspiracy count. The charge as given is all the more confusing because the language employed, "[Y]ou must find a defendant who was not a member of a single conspiracy not guilty of the conspiracy charge", clearly implies that if more than one distinct conspiracy is proven and the jury is satisfied that a defendant is guilty of one of them, the jury may under the conspiracy count convict that defendant of the particular conspiracy in which he is involved. Based upon Judge Motley's instruction the jury might understand, as we believe it did, that it could lawfully find one defendant guilty of one conspiracy and another defendant guilty of a separate and distinct conspiracy, all under the confused umbrella of the one conspiracy count.

In this case the jury may well have found if properly instructed that one separate, distinct and complete conspiracy existed among the group of individuals in Florida who took control of National Ventures, bought a large block of shares in Stern-Haskell, Inc. and then spun them off to the National Ventures

shareholders allegedly in violation of the registration requirements of the Federal Securities Laws. This may well have been a completed conspiracy in which defendants Wax, Levine, Gardner and Kaye as a matter of law played no part, for there is not one word of testimony in the record to connect them with these activities in any way whatsoever. The jury may then have found that a separate, distinct and complete conspiracy existed among the group of individuals which later allegedly planned and acted in New York to create and manipulate a market in the Stern-Haskell stock, which individuals as aforesaid had nothing to do at all with the spin-off. Certain defendants are common to both transactions and as such would be members of the two separate conspiracies.

Because of the offending instruction the jury was not given these decisions to make, and thus the main question here under discussion was never considered by them. Neither did the jury consider ancillary questions such as statute of limitations, an extremely important point in light of the fact that if we count back five years from the date of the indictment, June 4, 1974, we arrive at a point in time somewhere toward the end of what the jury may well have found was the New York marketing or manipulation conspiracy. This would have been long after the last act of an unlawful spin-off conspiracy took place and thus the prosecution of the Florida conspirators would have been time barred.

For the foregoing reasons therefore we respectfully request that the convictions be reversed.

POINT III

THE GOVERNMENT'S UNNECESSARY PRE-INDICTMENT DELAY AND PARALLEL CIVIL PROCEEDINGS PREJUDICED THE DEFENSE

A. Pre-Indictment Delay

Prior to trial, one of the motions made by defendant Levine was to dismiss the indictment because of pre-indictment delay. At that time the motion was denied. The motion was again renewed at the close of the case. At that time the Court reserved decision, but finally ruled in its opinion that defendants were not prejudiced.

After a lengthy trial of more than nine weeks involving thirty-eight Government witnesses with close to 500 Government exhibits, the prejudicial aspects of such a lengthy pre-indictment delay were greatly amplified. Practically all the witnesses had problems in recalling dates. Some of the instances during the course of trial which highlighted the prejudice were the poor memory of witnesses:

1. Kaye - regarding the dates of the alleged pay-offs and the formula for the pay-offs (1148a - 1150a, 1154a);
2. Kaye - date brokers bought stock (1157a, 1159a, 1161a);
3. Kaye - cannot recall conversations three years ago (1165a);
4. Mark - Regarding owner of Lockwood (1104a, 1105a)

5. Nelson - regarding reputation of brokerage houses in 1969 (1248a); and

6. Nelson - could not check on brokerage houses because they are now "out of business" (1250a).

The prejudicial aspects of the delay were most critical with respect to defendants Levine and Rubinson regarding the alleged pay-offs. Sidney Stein and Philip Kaye, key Government witnesses, testified that Levine received pay-offs in unspecified amounts. Neither Stein nor Kaye could pinpoint the date of these so-called pay-offs. The best Stein could do was to say that the payments were made at some time between April and July, 1969. Kaye placed the date of the alleged pay-offs at some time around the end of April or early May of 1969. These dates were very critical as to credibility as well as for statute of limitations purposes, but they could not be established with any accuracy at all.

The failure of witnesses to remember is not the only prejudice claimed. The government waited until the eve of the tolling of the five-year statute of limitations to obtain the indictment and in the interim the SEC conducted a complete civil investigation and trial, Securities and Exchange Commission v. Stern-Haskell, Inc. 70 Civ. 4065 (D.C. S.D.N.Y. 1970), and gained all of the fruits of civil discovery -- a dress rehearsal for the criminal trial.

It was at one time thought that the statute of limitations provided a defendant's only remedy in cases of pre-indictment delay. It is now clear that that is not so. In United States v. Marion, 404 U.S. 307 (1971), the Court said (p. 324):

> "* * * it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment."

The Court said that there can be circumstances in which, as a matter of Fifth Amendment due process, "actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."(p. 324).

Marion thus confirmed a principle which had already been accepted in this Circuit.

In United States v. DeMasi, 445 F.2d 251 (2nd Cir. 1971), cert. denied 404 U.S. 882 (1971), the Court said (p. 255):

> "* * * even within the limitation period, if the delay 'impair[s] the capacity of the accused to prepare his defense,' it may nonetheless reach constitutional proportions, if the prejudice is proven."

See also United States v. Feinberg, 383 F.2d 60 (2nd Cir. 1967), wherein the Court said (p. 65):

> "Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment * * * ."

In United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973), the Court said (p. 1092):

> "However, the Court in Marion explicitly left open the possibility that a demonstration of 'actual prejudice' stemming from pre-accusation delay might require a dismissal under the Fifth Amendment."

The United States Court of Appeals for the Third Circuit had also reached the same conclusion prior to the Marion decision, United States v. Feldman, 425 F.2d 688 (3rd Cir., 1970).

There is a wealth of authority on the question of what constitutes actual prejudice sufficient to require dismissal for delay as a denial of due process of law. In United States v. Feinberg, supra, 383 F.2d 60 (2nd Cir., 1967), the Court gave the following examples of the kind of prejudice which will support a due process claim based on pre-arrest delay (pp. 66):

> "Such a claim may arise if a key defense witness or valuable evidence is lost * * * [citation omitted], if the defendant is unable credibly to reconstruct the events of the day of the offense * * *[citation omitted], or if the personal recollections of the government or defense witnesses are impaired ***[citation omitted], because if any of these events occur the reliability of the proceedings for the purpose of determining guilt becomes suspect."

The principles announced in Feinberg were reaffirmed in United States v. DeMasi, supra, 445 F.2d 251 (2nd Cir. 1971), and in United States v. Blauner, 337 F. Supp. 1383 (S.D.N.Y.,

1971). In DeMasi, the Court, although it affirmed the conviction of the defendant, stated that "even within the limitation period," pre-indictment delay "may nonetheless reach constitutional proportions, if the prejudice is proven" (p. 255). The Court mentioned the following as examples of prejudice (p. 255):

1) Inability of potential or actual witnesses to "recall the events of the past;

2) that evidence was destroyed or mislaid.

In Blauner, supra, the Court, dismissing the indictment, considered pre-indictment delay. It stated (p. 1390):

> "[d]eliberate delay occurring within the statutory period may deprive a defendant of his constitutional right to a speedy trial."
> (Emphasis added)

This kind of prejudice described in the foregoing cases is precisely the kind of prejudice which has occurred here. Actual prejudice resulting from the delay having been shown, the indictment should be dismissed.

B. Parallel Proceedings

As stated above the Government by having the benefit of a parallel civil proceeding gained an extreme tactical advantage. The Government was in the enviable position of being able to pick its witnesses carefully, through actual experience, while at the same time knowing exactly who defendants would call, if

in fact they did call someone. This was clearly shown when Mr. Keegan, attorney for defendant Reynolds, called Charles W. Cairnes to the stand. The prosecutor had a plethora of information for cross-examination (T. 6204).

We contend that the Government delayed the presentation of this case to a Grand Jury for at least two and one-half and probably more than four years after the time at which it first determined there was basis for a criminal prosecution. This delay was advantageous to the Government and deliberately done, we submit, to permit the parallel civil proceeding to run its full course, including for example unlimited discovery and the taking of the accused's testimony. Only after the civil action was concluded (two years after it was concluded, to be more exact), did the Government finally divulge its intention to proceed criminally as well. The Government made a choice in order to obtain an advantage - it must then suffer the accompanying disadvantage for it must recognize that its decision resulted in a violation of defendants' constitutional rights.

This practice was condemned in United States v. Parrott, 248 F. Supp. 196 (D.C. D.C., 1965), there the Court, in dismissing the indictment, framed the questions presented in the following manner (p. 199):

"Two separate but related principles of

> law are involved in the consideration of these motions. First: may the Government by bringing a parallel civil proceeding avail itself of the almost unlimited opportunity that a civil litigant has to take extensive depositions of the other party to the civil proceeding and then utilize the fruits of this interrogation, as well as seizures without a warrant of books and records of certain of these defendants, in the preparation of the criminal case? Second: is the delay which occurred between the discovery of this alleged scheme to defraud and the bringing of the indictment in violation of the Sixth Amendment right to a speedy trial or Rule 48(b) of the Federal Rules of Criminal Procedure?"

The Court answered the first question clearly and unequivocally (p. 202):

> "* * * the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution."

POINT IV

APPELLANT LEVINE RESPECTFULLY ADOPTS THE ARGUMENTS OF APPELLANT RUBINSON REGARDING: BLANKET TIME LIMITATIONS ON CROSS-EXAMINATION, RECROSS-EXAMINATION AND SUMMATION; LIMITATION ON THE SCOPE OF RECROSS-EXAMINATION; AND CRIMINAL INTENT

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to dismiss the indictment; in the alternative, the case should be remanded for a new trial.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Defendant-Appellant
Lawrence Levine
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Thomas A. Andrews
John J. Grimes

Of Counsel.